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In the

Supreme Court of the United States

October Term, 1971

No. 71-829

Leila Mourning,

Petitioner,

v.

Family Publications Service, Inc.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondent, in its opposing brief in No. 71-829, urges that certiorari should be denied because the decision of the Court of Appeals is sustainable on independent grounds not reached by the court below.

Regardless of the existence of other grounds on which the decision below might be affirmed, this Court should grant the writ of certiorari to review the important question reached by the Court of Appeals regarding the validity of the four instalment rule, 12 C.F.R. §226.2(k). Only this Court can resolve the commercial and governmental uncertainty which have been wrought by the decision of the Fifth Circuit. In the event that section 226.2(k) is upheld and that Respondent's other contentions appear substantial, the case can be remanded to the Court of Appeals for

consideration of any remaining issues not appropriately considered by this Court. Compare *N.L.R.B.* v. *Scrivener*, —— U.S. ——, —— (1972).

The independent grounds advanced by Respondent for affirming the judgment of the Court of Appeals are not persuasive.

Respondent contends that the civil liability provision of the Truth in Lending Act is inapplicable because no finance charge was imposed in the instant case. Respondent of course did not disclose any finance charge to Petitioner, but whether there was a finance charge hidden in the total price of the magazines is a question of fact not resolved by either court below. Respondent now concedes that cash customers may have paid less than installment customers (Respondent's Brief, p. 9, note), which is substantial evidence of a hidden finance charge. Compare 15 U.S.C. §1605(a), 12 C.F.R. §226.4(a).

Section 1640(a), 15 U.S.C., on which Respondent relies, does not make imposition of a finance charge a precondition of liability, but merely uses the finance charge to compute the amount of liability under certain circumstances. While the section provides that liability shall generally be "twice the amount of the finance charge in connection with the transaction," it adds "*except* that the liability under this paragraph shall be not less than $100 nor greater than $1,000." (Emphasis added) This latter clause creates an exception to the former, and the $100 minimum is literally as applicable whether the finance charge was one cent or nothing at all. The only federal court reaching this question has held that the actual imposition of a finance charge is not a precondition to liability under section 1640(a). *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

Respondent further urges that the Truth in Lending Act is inapplicable to the transaction in question because Respondent did not in fact extend credit to Petitioner. The District Court concluded on the basis of the facts before it that Respondent had indeed extended credit to Petitioner, and the Court of Appeals did not reach this question. (Petitioner's Appendix, p. 4a) This Court does not generally undertake on petitions for certiorari to correct errors of fact finding or to review evidence, compare *United States v. Johnston*, 268 U.S. 220, 227 (1926); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949), and should decline Respondent's invitation to do so in this case. The District Court in reaching its conclusion took particular note of evidence that Respondent, in its dunning letters to Petitioner, had stated "*This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan" (letter of December 4, 1969), and "The contract you signed is: Not subject to cancellation..." (letter of December 16, 1969). It would be inappropriate for Respondent to succeed in avoiding a hearing before this Court by urging that these representations which it made to Petitioner when she was without counsel were technically incorrect.

Respondent founds its legal contention that no credit was involved in this case on the fact that Respondent was required to pay for the magazines before they arrived and the allegation, not supported by anything in the record, or ever disclosed to Petitioner, that Respondent did not "generally" pay for the magazines in a lump sum in advance (Respondent's Brief, p. 22). Whatever the significance of these factors in determining the existence of a debt at common law or under the tax code, they have little relevance to the purposes of the Truth in Lending Act. That Act was

passed so that a consumer like Petitioner, in trying to de
whether and from whom to purchase magazine subs
tions, would know that the contract offered by Respon
would cost a total of $122.45. Petitioner's need for
information was the same regardless of whether she
Respondent paid for the 60 month subscription in 30, 6
90 months. The Act should be construed accordingly.

Respectfully submitted,

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